UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABC AEROLINEAS, S.A. de C.V., d/b/a INTERJET, Petitioner, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, Respondent.	)	Case No. 17-1056

ORIGINAL

PETITION FOR REVIEW

Pursuant to 49 U.S.C. § 46110, Federal Rule of Appellate Procedure 15(a), and other applicable authority, petitioner ABC Aerolíneas, S.A. de C.V., d/b/a Interjet ("Interjet") hereby petitions for review of Final Order 2016-12-13 issued by the United States Department of Transportation ("DOT") on December 12, 2016 in response to the request of Delta Air Lines, Inc. and Aerovías de México, S.A. de C.V. for immunity from U.S. antitrust laws in order to operate a Joint Venture between the United States and Mexico (the "Order") (attached hereto). The Order is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, in excess of statutory authority, and without observance of procedures required by law.

The corporate disclosure statement required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 is attached to this Petition.

Respectfully Submitted,

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(D.C. Bar No. 236398; Court of Appeals Bar No. 27053)

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Dated: February 13, 2017

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABC AEROLINEAS, S.A. de C.V., d/b/a INTERJET,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 17-1056

ORIGINAL

RULE 26.1 CERTIFICATE OF CORPORATE DISCLOSURE FOR PETITIONER ABC AEROLINEAS, S.A. de C.V., d/b/a INERJET

Pursuant to Federal Rule of Appellate Procedure 26.1 and 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, ABC Aerolíneas, S.A. de C.V., d/b/a Interjet ("Interjet") hereby discloses the following:

Interjet is privately-held commercial airline operator. Interjet is not publicly held or traded.

Interjet certifies that the following officers, directors or trustees of Interjet have an interest in the outcome of this case or appeal:

- Mr. Jose Luis Garza Alvarez, Chief Executive Officer
- Mr. Luis Alejandro Beristain Mercado, Chief Financial Officer
- Mr. Francisco Javier Licea Ventura, Chief Operating Officer
- Mr. Luis Alberto Hernandez Garcia, General Counsel and Legal Vice President
- Mr. Oscar Arguello Ruiz, Technical Vice President
- Mr. Benjamin Mejia Ortiz, Operational Security Vice President

Interjet further certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of Interjet's stock, and other identifiable legal entities related to Interjet:

- Mr. Miguel Aleman Velasco
- Mr. Miguel Aleman Magnani
- Mr. Jorge Aleman Velasco
- Mr. Beatriz Aleman Velasco de Giron
- Galem, S.A. de C.V.
- Aleman Group

Respectfully Submitted,

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Dated: February 13, 2017

Order 2016-12-13
Issued: December 14, 2016

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 14th day of December, 2016

Joint Application of **DELTA AIR LINES, INC.** **AEROVIAS DE MEXICO, S.A. DE C.V.** **Under 49 U.S.C. §§ 41308 and 41309 for Approval of and Antitrust Immunity for Alliance Agreements**	**Docket DOT-OST-2015-0070**

FINAL ORDER

I. SUMMARY

By this Order, the Department of Transportation (the Department or DOT) grants approval of, and antitrust immunity (ATI) for, the proposed alliance agreements submitted by Delta Air Lines, Inc. (Delta) and Aerovías de México, S.A. de C.V. (Aeromexico) (collectively, the "Joint Applicants"), with conditions.[1, 2]

The Joint Applicants have requested a grant of immunity from the U.S. antitrust laws in order to allow Delta and Aeromexico to operate a joint venture (JV) between the United States and Mexico.[3] Based on its analysis, the Department believes the proposed alliance has the potential to deliver substantial public benefits to the travelling public, including broader connectivity between the United States and Mexico, improved network coordination, reduced travel times, and improved efficiency. However, the Department also identified significant competitive issues that could prevent the public from realizing those benefits if left unchecked. Therefore, in order to ensure adequate competition in the covered market, thereby making the approval of the alliance pro-consumer, our grant of antitrust immunity (ATI) is subject to a number of conditions. Among those conditions is the requirement that the Joint Applicants divest 24 slot-pairs at Mexico City's Benito Juarez International Airport (MEX) and four (4) slot-pairs at New York City's John F. Kennedy International Airport (JFK). We will also limit the duration of our grant of ATI to five years, among other conditions.

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[1] The common names of the carriers are used throughout this Final Order.

[2] The agreements are the "Joint Cooperation Agreement" and those agreements enumerated in section 2.1 thereof.

[3] *See* Docket DOT-OST-2015-0070, Delta Air Lines, Inc. and Aerovías de México, S.A. de C.V. - Approval of and Antitrust Immunity for Alliance Agreements, hereinafter "Joint Application" at 1.

The Department received numerous comments from a broad range of stakeholders in response to the Department's Show Cause Order (2016-11-2, Nov. 4, 2016). In response to those comments, we have made adjustments to our conditions that we believe will make them more effective and strike the proper balance. The Department believes that if the remedies and conditions are adopted, the proposed alliance will not reduce competition and will provide substantial public benefits.

II. OVERVIEW OF DECISION ON THE MERITS

On March 31, 2015, Delta and Aeromexico filed a joint application requesting approval of, and antitrust immunity for, agreements covering foreign air transportation between the United States and Mexico.[4] The alliance agreements at issue in the application would allow Delta and Aeromexico to operate a metal-neutral joint venture between the United States and Mexico. The Joint Applicants argue that, "[a]ntitrust immunity for the Alliance Agreements is necessary for Delta and Aeromexico to achieve the synergies and public benefits that will flow from the [joint venture]."[5] They further argue that such a grant would not lead to a substantial reduction in competition and would provide substantial public benefits.

The Department issued a Show Cause Order (Order 2016-11-2, the Show Cause Order) on November 4, 2016, announcing the Department's tentative decision to approve the proposed alliance, with conditions. In order to ensure sufficient competition in the environment in which the proposed alliance will operate, as well as to alleviate the competitive harm likely to result from the transaction, the Department proposed remedies, namely slot divestitures at JFK and MEX. The Department also tentatively concluded that its grant of ATI should be limited to five years, thereby allowing the Department to reevaluate the competitive and regulatory situation at that time. The Department also tentatively required the Joint Applicants to modify and resubmit their alliance agreements to remove exclusivity clauses. The Department also included its standard conditions concerning annual reporting and Origin & Destination (O&D) survey data reporting, among others.

To support the tentative conclusions in the Show Cause Order, the Department conducted a thorough review of the evidentiary record and made several tentative findings. We assessed the competitiveness of the U.S.-Mexico transborder market as it stands, as well as the effects on competition likely to result from the transaction at the network, country-pair, and city-pair level. Based on that analysis, the Department tentatively concluded that approving the Joint Application will not substantially reduce or eliminate competition, except with respect to JFK and MEX, largely resulting from the infrastructure constraints at those airports, and, at MEX, the lack of a slot regime that comports with international standards and which has been deemed anticompetitive by the Comisión Federal de Competencia Económica (COFECE, Mexico's competition regulator).[6]

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[4] On April, 8, 2016, the Department issued a notice suspending the procedural schedule of the case. After issuing two formal requests for additional evidence from the Joint Applicants, the Department issued a notice establishing a procedural schedule on June 15, 2016.

[5] *See* Joint Application, DOT-OST-2015-0070-0001, Mar. 31, 2015, at 3.

[6] *See* COFECE Report Translation, DOT-OST-2015-0070-0037, Jun. 1, 2016.

As the Department noted in the Show Cause Order, the importance of access to Mexico City cannot be overstated. Approximately two-thirds of all domestic and one-third of all international passengers in Mexico have their origin or destination at MEX.[7] The main contested issue in this proceeding has been the ability, or lack thereof, of new entrant carriers to access the important Mexico City market. The record contains substantial evidence that the Joint Applicants exert significant market power at MEX, control approximately 50% of MEX slots, and are able to use the MEX slot allocation system to their advantage by leveraging its non-standard rules to preclude competitive entry by other carriers.[8]

We also, however, have statements on the record from Aeropuerto Internacional de la Ciudad de México (AICM, the operator of MEX) and the Dirección General de Aeronáutica Civil (DGAC, which oversees AICM), stating that they have made improvements to the slot allocation system at MEX since COFECE's report was published and that it is in the process of implementing a system more compatible with the International Air Transportation (IATA) Worldwide Slot Guidelines (WSGs). The Department fully supports those efforts. However, the record is not clear as to when or if those reforms will be implemented. Further, COFECE has yet to release its final recommendations for reforms, which the Mexican Government will then need to evaluate and address.

We note the position of AICM and the DGAC, but the Department must make a decision in this case now, using the evidence at hand. Based on that evidence, we are here finalizing our determination in the Show Cause Order that a grant of ATI cannot be justified without stringent conditions to ensure that public benefits are realized. We will, however, modify our tentative decision in that we will require ten MEX slot-pairs and two JFK slot-pairs to be subject to exhaustion of efforts by the receiving carriers. We will also reduce the number of required divestitures at JFK from six to four. We are finalizing all other conditions and remedies proposed in the Show Cause Order.

III. SUMMARY OF RESPONSIVE PLEADINGS

The Department invited public comment on the Show Cause Order. The comment period closed on November 30, 2016. The Department received several comments from various stakeholders. Those comments are summarized below.

A. Hawaiian

Hawaiian filed comments generally supporting the Department's tentative decision. Hawaiian commends the Department's decisions to confirm that all aspects of an Open Skies agreement be in place before considering a grant of ATI; requiring the removal of exclusivity clauses from the alliance agreements; recognizing that competitive access to commercially viable slots at capacity-constrained airports promotes competition; and requiring the applicants to reapply for ATI after a five-year period. Hawaiian states that, in its experience, lack of access to commercially viable slots can limit the ability of competitive carriers to enter new markets, curtailing the competitive benefits to consumers of new entry. Finally, Hawaiian respectfully disagrees with the Department's decision not to grant independent carrier access to foreign carrier O&D data. Hawaiian argues that, even assuming strict compliance with the Department's regulations concerning access to O&D data, the Department has ignored the fact that the foreign carrier in an antitrust immunized partnership could share its data with its U.S. partner. Additionally, Hawaiian argues that immunized partners indirectly benefit through the insights gained from O&D data while undertaking joint network planning and revenue management activities.

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[7] *Id.* at 124.

[8] *See* Order 2016-11-2, at 16.

B. JetBlue

JetBlue submitted comments supporting the Department's tentative decision in the Show Cause Order. JetBlue states that because of the massive size of the "big three" airlines, along with their demonstrated anticompetitive tendencies, basic questions about airport access and the ability of smaller competing airlines like JetBlue to serve certain markets are now at the forefront of aviation public policy. JetBlue states that its experiences at MEX are consistent with the Department's findings concerning opaque and non-standard slot allocation practices, limited ability for new entry, and the ability of the Joint Applicants to thwart new entry.

JetBlue provides comments on the implementation of the Department's proposed slot remedy. Specifically, JetBlue suggests that the remedy be phased-in over a three-year period with 10 MEX slot-pairs and six JFK slot-pairs being divested in 2017, followed by seven MEX slot-pairs each in 2018 and 2019. JetBlue further suggests that the MEX divestitures be spread throughout the 0700-2259 time period, and that no more than three slot-pairs per hour be divested. JetBlue suggests that, with the Joint Applicants' vast slot portfolio at MEX and their ability to upgauge aircraft, these provisions would minimize the impact on their operations. JetBlue also recommends that if a carrier that receives divested slots no longer wishes to operate them, the slots should revert to the Department for reallocation. If no carrier applies for them, they would revert to the Joint Applicants, but still be subject to the on-going slot remedy and be available at any time for eligible carriers to request. JetBlue also acknowledges that if at any time eligible carriers are able to acquire commercially viable slots at MEX, the carrier would not need to rely on the remedy slots and those slots would remain with the Joint Applicants.

JetBlue also supports the Department's tentative decision to limit the grant of ATI in this proceeding to five years. JetBlue states that such a practice is common in other jurisdictions, including U.S. aviation partners in Australia, the European Union, New Zealand, and South Korea. JetBlue notes that it is rare for a government to grant any exemption or approval in perpetuity. JetBlue urges the Department to include similar provisions in all future ATI grants. JetBlue also states that it is disappointed that the Department did not adopt JetBlue's recommendation that annual reports of ATI alliances be made public. JetBlue, however, believes that, in this instance, the Department's decision to limit ATI to five years and require a *de novo* application is an adequate alternative. JetBlue also supports the Department's decision to require the removal of exclusivity clauses from the alliance agreements.

In its reply, JetBlue argues that the Department should ignore the Joint Applicants' claims that they may abandon the JV if the Department moves forward. JetBlue cites press reports quoting Aeromexico's CEO as stating that the two carriers plan to move forward with the JV, regardless of the Department's ultimate decision. JetBlue further argues that the Joint Applicants' claims that circumstances have improved at MEX since the COFECE report was published are specious and irrelevant. JetBlue states that the Joint Applicants claims that there are no barriers to entry at MEX are completely contrary to JetBlue's experience at MEX. Further, JetBlue points out that the Joint Applicants, as well as AICM and the DGAC, had multiple opportunities to provide their own views on the COFECE report on the record but failed to do so. JetBlue argues that the Department should not accept claims by the Joint Applicants, AICM, and the DGAC that the MEX slot regime has improved, as JetBlue continues to have its MEX slot requests go unheeded.

JetBlue also states that it is unaware of any progress that AICM has made in implementing the IATA WSGs at MEX, despite the Joint Applicants' claim in March 2015, that they would be implemented in the next year. JetBlue finds AICM/DGAC's current claims that they will be implemented by the second quarter of 2017 unconvincing.

JetBlue also argues that the Joint Applicants have made several incorrect and misleading arguments in their pleading. First, JetBlue argues that the Joint Applicants improperly assume that other carriers will soon enter the JFK-MEX market because they ignore the slot restrictions in place on both ends of the route. JetBlue also does not believe that Aeromexico would be forced to cancel service to certain destinations, as it can easily upgauge many of its existing services. JetBlue also disagrees with the Joint Applicants arguments concerning JFK and the New York City market. JetBlue states that the market for Mexico City service favors JFK over Newark-Liberty International Airport (EWR). JetBlue notes that both Interjet and Volaris have chosen to serve JFK instead of EWR, and that in fact, no Mexican carrier serves EWR. JetBlue also states that even though United has operated EWR-MEX service for decades, it has never substantially increased its frequency on the route, indicating it will not add new competitive discipline to the market.

JetBlue also argues that the Joint Applicants have misconstrued the Department's precedential history regarding slot divestitures. JetBlue argues that the Joint Applicants ignore the Department's decision in 2002 to condition the approval of a joint venture between American Airlines and British Airways on the carriers' divestiture of 17 daily slot-pairs at London-Heathrow (LHR). Further, JetBlue states that it does not oppose the expanded remedy suggested by Interjet and that it believes the Department does have the authority to compel a slot divestiture at MEX. JetBlue also disagrees with American's arguments that it should be eligible to receive divested slots and argues, contrary to American, that all future ATI grants should include time limitations. JetBlue also supports the Department's tentative decision to require the removal of exclusivity clauses. Finally, JetBlue argues that the Department's procedures and reasoning in this case have been fully compliant with the Administrative Procedures Act (APA).

C. Southwest

Southwest filed an Answer stating that it strongly supports the Department's tentative decision to require the Joint Applicants to divest 24 MEX slot-pairs. Southwest states that the decision is eminently reasonable and extremely well justified. Southwest reiterates the difficulty it and other U.S. low-cost carriers (LCCs) have had in accessing slots at MEX. Southwest argues, however, that the divested slots should only be made available to U.S. LCCs. Southwest argues that Mexican airlines already hold the vast majority of MEX slots and do not need or deserve more slots through a divestiture. Southwest notes the Department's tentative exclusion of Interjet, but believes that Volaris and VivaAerobus, which hold 58 and 32 slot-pairs respectively, should also be excluded. Southwest states that these carriers can profitably redeploy slots they use in the Mexican domestic market for transborder service and upgauge other flights. Southwest also urges the Department to ensure that sufficient gates and other necessary facilities are made available commensurate with the slot divestitures. Unlike JetBlue, Southwest does not believe hourly slot divestiture limits are necessary given the Joint Applicants' large slot holdings.

Southwest also believes that the Department should reduce its tentative decision to grant ATI from five years to three years, and require annual ATI reviews to ensure that MEX is adapting its slot management system to a more transparent one, in line with international norms including the IATA WSGs. Southwest believes five years is too long given the anticompetitive situation at MEX. Southwest further argues that, given the existing relationship between Delta and Aeromexico and the investments that have already been made in that relationship, a time-limited grant of ATI should not prevent their commitment to a JV.

Southwest also requests that the Department require Cancun to reform its local slot program and adopt international norms such as the IATA WSGs, to prevent what it claims are anticompetitive practices by Delta to block access for LCCs.

In reply comments, Southwest argues that the proposed divestitures will not affect the public benefits of the JV because the Joint Applicants do not utilize 39 percent of their MEX slots, a figure they have not provided evidence to rebut. Further, Southwest argues that it is clear the Department has authority to require the proposed divestitures at MEX. In response to the Joint Applicant's arguments that the Department has exceeded its authority by going beyond a strict Clayton Act test in its analysis, Southwest points out that the Department is statutorily charged with addressing broad public interest concerns in its analysis of requests for antitrust immunity. The Clayton Act test is one part of that analysis, but not its entirety. Southwest does not support the phased approach to implementation of the divestiture suggested by JetBlue. Southwest also argues that the Joint Applicants', AICM's, and DGAC's claims that the Department's decision offends international comity are baseless. Southwest notes the Department's recent rejection of the American-Qantas ATI application, in a market that has had an Open Skies relationship for almost a decade, as proof that an Open Skies agreement does not guarantee a grant of ATI.

D. Volaris

Volaris filed an answer in which it did not seek to comment on the merits of the Show Cause Order and the grant of ATI, but to support the remedies recommended by the Department. Volaris commends the Department for recognizing the scope of the access problems at both JFK and MEX, acknowledging that competitive discipline can be exerted by both Mexican and U.S. LCCs, and limiting the grant of ATI to five years. Volaris agrees with the Department that an unconditioned grant of ATI could position Delta and Aeromexico to take advantage of the current slot regime in order to prevent new entry or expansion of service by other carriers. Volaris agrees that a significant slot divestiture is necessary in order to counter this potential result and ensure the arrangement benefits the public interest. Further, Volaris supports the Department's tentative decision to limit the grant of ATI to five years. Volaris states that because the Mexican Government has not yet adopted COFECE's proposed slot administration reforms, limiting the duration of ATI will help mitigate potential anticompetitive effects.

In reply comments, Volaris continues to argue that significant barriers to entry exist at both JFK and MEX that must be remedied. Volaris also contests arguments that the proposed divestitures will harm service to smaller Mexican communities, given the findings by COFECE that Aeromexico does not utilize a large portion of its MEX slot portfolio. Volaris' also rebuts the Joint Applicants' arguments that new entry at MEX is possible. Volaris states that its new transborder services were not the result of acquiring new MEX slots, but rather repurposing existing slots. Volaris states that, due to complicated procedures at MEX, it would have had to delay the start of new service by as much as nine months had it requested new slots for the service. Volaris also believes the Department's divestiture is reasonable and precedented, and agrees with the Department's carrier eligibility determinations.

E. Interjet

Interjet filed comments objecting to a number of aspects of the conditions proposed by the Department in the Show Cause Order. First, Interjet states that the proposed slot divestitures at JFK are inadequate to remedy the competitive harm from a grant of ATI to Delta and Aeromexico. Interjet argues that the Joint Applicants should be required to divest at least 10 slot-pairs at JFK. Interjet argues that a significant portion of JFK-MEX traffic is time-sensitive business travel, and the Joint Applicants' extensive slot holdings in peak-hours provide them with both a quantitative and qualitative advantage. Further, Interjet argues that the Joint Applicants should be required to divest at least 36 slots pairs at MEX. Interjet cites COFECE's finding that in 2014, Aeromexico did not use 39 percent of its MEX slots. Interjet states that even allowing for changes since 2014, it is hard to imagine that Aeromexico has increased its MEX operations, and therefore utilization, by 39 percent.

Interjet also disagrees with the Department's tentative decision that it is not eligible to receive divested MEX slots. Interjet argues that it does not have a significant share of U.S.-Mexico transborder traffic and that public benefits would be maximized if Interjet is allowed to compete with other LCCs for the divested slots. Interjet also argues that the Department does not have the authority to require the Joint Applicants to transfer their MEX slots directly to competing carriers selected by the Department. Rather, Interjet argues that only AICM can determine which carriers receive the divested slots and what restrictions may apply to the use of those slots.

In its reply comments, Interjet continues to urge the Department to dismiss the Joint Applicants' arguments that the COFECE remedy is sufficient to address any harm from the transaction. Interjet also continues to support even larger divestitures at MEX and JFK, citing the barriers to entry and the Joint Applicants' large slot holdings at both airports. Interjet also states that the Department should defer to the Mexican Government to allocate the divested slots, as it believes AICM is best positioned to administer such an allocation. Finally, Interjet argues that neither its exclusion from eligibility by the Department, nor Southwest's argument that all Mexican carriers should be excluded, serve the public interest.

F. American

American filed objections to the Department's tentative decision in the Show Cause Order to prohibit certain carriers, including American, from acquiring any of the proposed slot divestitures. American argues that all carriers should be able to participate in the process. American cites its efforts to grow services to Mexico City through its investments in its DFW hub, as well as acquiring assets at MEX. American argues that the Department's tentative decision is not supported by precedent, claiming that those precedents cited in the record by Southwest concerned domestic airports. American also argues that the Department's tentative decision to limit its grant of ATI to five years should not be applied to future cases, but rather constrained to the unique circumstances of this case. American argues that joint ventures require significant long-term investments and such time limits would discourage their formation and deprive the public of their benefits. In its reply comments, American repeated its arguments for its inclusion in any slot remedy.

G. Dirección General de Aeronáutica Civil

The Dirección General de Aeronáutica Civil (DGAC) submitted comments objecting to the Department's proposed remedies. The DGAC states that the slot divestitures and the five-year time limit of the approval are excessive and unprecedented, and are not in keeping with the spirit of the recently liberalized bilateral aviation agreement between the United States and Mexico. The DGAC argues that the COFECE remedy is sufficient and represents an appropriate balancing of the competitive interests. The DGAC states that the Department chose to disregard COFECE's determination and instead impose a punitive slot remedy. The DGAC further argues that in reaching its tentative conclusions, the Department relied on a report from COFECE that is based on out of date data that does not reflect the current slot regime at MEX.

The DGAC also argues that the size of the slot divestitures at MEX is unprecedented, stating that the largest divestiture required to date was four slot-pairs at London-Heathrow (LHR), and that such a large divestiture as proposed exceeds antitrust standards. The DGAC also disagrees with the Department's characterization that the current MEX slot regime is not transparent, stating that the Airports Law and regulations and the Civil Aviation Law and regulations, as well as the AICM guidelines and general operating rules for MEX, are all available online, along with historic and current slot allocation statistics. The DGAC also states that software is now in operation at MEX that allows for matching a flight plan filed with air traffic control to a slot authorized by AICM. Further, the DGAC states that it will be implementing SLOTIX software in January 2017, allowing AICM to optimize the slot allocation process, monitor slot usage in real-time and provide a platform for the exchange of slots. The DGAC states that the current regime includes many of the key aspects of the IATA WSGs, and that there has been significant new and expanded service at MEX in the past several years. The DGAC states that it supports adoption of the IATA WSGs and that they will be implemented at MEX in early 2017.

The DGAC further argues that it understood that a prompt and favorable grant of antitrust immunity was necessary for Mexico's willingness to agree to the new liberalized aviation agreement. The DGAC states that the Mexican Government moved forward to implement the agreement in good faith with the expectation that ATI would be favorably granted, subject to reasonable conditions.

The DGAC also states that the five-year time limit to the grant of ATI is unprecedented and that the Department has not similarly limited a grant of ATI in any other proceeding. The DGAC argues that the time limit may distort the pro-consumer incentives generated by the proposed alliance. The DGAC also states that the construction of the New International Airport at Mexico City, scheduled to open in 2020, will eliminate any capacity constraints at MEX. The DGAC also disagrees with the Department's tentative finding that Toluca is not a substitute airport for MEX.

H. Aeropuerto Internacional de la Ciudad de México

Aeropuerto Internacional de la Ciudad de México (AICM), the operator of MEX, filed comments substantially similar to those filed by the DGAC. AICM argues that the Department placed too much weight on COFECE's report on the slot allocation regime at MEX, given its preliminary status and the fact that it relies on data from 2009-2014. AICM also states, as did the DGAC, that the laws, regulations, and rules governing slots and operations at MEX are available online. AICM states that its slot allocation system is compliant with many of the aspects of the IATA WSGs, and stated that it informed the Department in May 2016 that it would be implementing a slot allocation system based on the IATA WSGs in June 2016. As did the DGAC, AICM states that it has implemented software improvements to better track slot usage with actual operations, and plans to implement SLOTIX in January 2017. AICM states that it plans to adopt IATA WSG recommendations no later than the second quarter of 2017.

AICM also takes issue with the COFECE report's claim that AICM does not enforce usage requirements. AICM states that it revoked over 7,000 allocated slots for failure to comply with usage requirements. AICM also states that it has been able to accommodate new entry from several carriers (Mexican, U.S., and international) in the last two years. AICM also states that the divestiture of 24 slot-pairs would negatively impact connectivity at MEX, both to smaller Mexican destinations and to the United States, thereby reducing the potential public benefits of the transaction.

I. Joint Applicants

The Joint Applicants filed comments objecting to the Department's findings and proposed remedies, largely echoing those of the DGAC and AICM. First, the Joint Applicants argue that the Department erred in its competitive effects analysis. They argue that the Department improperly excluded EWR when considering competition in the New York City – Mexico City (NYC-MEX) market. The Joint Applicants also argue that there are no barriers to entry at MEX, claiming that the COFECE remedy (requiring the divestiture of eight MEX slot-pairs) is more than sufficient to remedy any competitive concerns in the NYC-MEX market.

Agreeing with the DGAC and AICM, the Joint Applicants argue that the COFECE report on slot administration at MEX is outdated and should not be relied upon by the Department. The Joint Applicants state that much has changed at MEX since the report was issued and those changes should remove any basis for concern about the MEX slot regime. The Joint Applicants repeat the DGAC and AICM arguments that the laws and regulations governing the slot regime are available online and that AICM plans to implement an IATA WSG compliant slot allocation system in either January 2017, or by no later than the second quarter of 2017. The Joint

Applicants again go on to quote the DGAC's comments in arguing that new entry has been facilitated at the airport.

The Joint Applicants also argue that there are no barriers to entry at JFK for competitive service to MEX. They cite existing service on the route from Interjet, as well as Volaris' announced new service beginning in March 2017. The Joint Applicants also argue that JetBlue and American both hold significant JFK slots and could initiate service if they choose. They argue that the Department should consider service from JetBlue and American as "committed future market participants" and be included in the competitive analysis.

The Joint Applicants argue that the NYC-MEX market analysis must include EWR. They argue that federal courts and the Department have both previously concluded that JFK and EWR are competitive substitutes in the New York City market. The Joint Applicants state that JFK and EWR are equidistant from midtown Manhattan and that both airports attract substantial passengers from Manhattan, specifically, and New York City, generally.

The Joint Applicants argue that the Department's proposed remedies are unconnected to any theoretical harm posed by the JV. They claim that the Department's failure to include EWR in its analysis of the NYC-MEX market ignores actual and potential competition that will discipline the JV. They also argue that the growth plans of the JV cited by the Department are not harmful to consumers, but actually a benefit. The Joint Applicants also point out that once the COFECE remedy is implemented, they will hold no more MEX slots than Aeromexico currently does, which should alleviate any Departmental concerns about market concentration at MEX. The Joint Applicants maintain that the divestitures are unwarranted in that they greatly exceed those required in any previous ATI proceeding.

The Joint Applicants contend that the Department's proposed MEX divestitures offend international comity. They claim that the Department is using this ATI proceeding as an attempt to engineer the slot regime at MEX, thereby usurping the Mexican Government's authority. The Joint Applicants argue that other foreign authorities may require reciprocal demands upon the United States.

The Joint Applicants further argue that the divestitures at MEX would require them to reduce or eliminate service to many smaller Mexican cities, reducing feed for transborder and other international services, thereby suboptimizing MEX as a connecting hub and undermining the public benefits of the JV.

The Joint Applicants also claim that the Department's proposed five-year time limit to its grant of ATI is unprecedented and harmful to consumers. They state that doubts about the longevity of the arrangement would cause the parties to alter their investment and integration plans. The Joint Applicants state that given the Department's right to amend, modify, or revoke a grant of ATI at any time, the Department has no need to place a time limit on the grant of ATI.

The Joint Applicants also contend that the Department's requirement to strike the exclusivity clauses from the alliance agreements is unprecedented and harmful to consumers. They claim that the provisions are needed to eliminate free-rider concerns and to ensure investment incentives are aligned.

Finally, the Joint Applicants state that the Department's Show Cause Order does not represent reasoned decision making and is deficient under the Administrative Procedures Act (APA). They claim that the Show Cause Order does not establish a rational connection between the proposed slot divestiture and any potential competitive harm from the JV. They also claim that the divestiture constitutes an unacknowledged and unexplained departure from the Department's practice. They argue that the Department's decision did not address issues made pertinent by Congress, namely international comity and foreign relations considerations.

In their reply comments, the Joint Applicants largely repeated their initial arguments against the Department tentative decision. The Joint Applicants argue that the only potential competitive harm resulting from the JV would be on the JFK-MEX overlap route, and that several carriers have or soon will enter the route. They also explain that EWR is a viable commercial alternative and that the Department's analysis failed to account for the substitutability of this airport and its recent change in designation to IATA Level 2. As such, harm is unlikely to result and remedies are unnecessary. The Joint Applicants also argue that the filings by AICM and the DGAC state that the slot allocation problems at MEX have largely been solved and the Department should take them at their word.

They further argue that MEX slots and access are not a relevant market for antitrust analysis and that similar remedies have not been required in analogous situations previously. The Joint Applicants state that their proposed alliance is no different than many of the other alliances that the Department has previously approved and immunized, and that theirs should be subject to the same conditions as those other ATI grants.

J. Delta Master Executive Council

The Delta Master Executive Council (Delta MEC) of the Air Line Pilots Association, International submitted objections to the Department's Show Cause Order. The Delta MEC argues that the limitations called for in the Show Cause Order will negatively impact the scope and benefits of the proposed alliance for two primary reasons: (1) the slot divestiture requirements will undercut the Joint Applicants' ability to service those markets with optimum efficiency, harming their ability to deliver the benefits of the proposed alliance; and, (2) the five year limit of the ATI grant will diminish the Joint Applicants' incentive to make the needed investments to realize the benefits of the cooperation.

K. Frente por la Defensa de la Aviación Nacional

The Frente por la Defensa de la Aviación Nacional, an umbrella group representing several Mexican aviation workers' unions, filed reply comments. Its comments contained similar arguments as the DGAC, AICM, and the Joint Applicants. The Frente believes the Department's proposed remedies would reduce the public benefits of the proposed alliance and cause Aeromexico to reduce its transborder service and service to small and medium-sized Mexican communities. It also argues that the proposed time limit would reduce the parties' incentives to invest in the JV. Finally, the Frente argues that the proposed remedies violate the Mexican Constitution and Mexican sovereignty.

L. Asociación Sindical de Pilotos Aviadores de México

The Asociación Sindical de Pilotos Aviadores de México, the union representing Aeromexico's pilots, filed objections to the Department's tentative decision, arguing that, if implemented, it would force Aeromexico to reduce its pilot workforce. It argues that the Department applied unprecedented analysis in this case and that the proposed divestitures and time limit are unnecessary. It further argues that the proposed remedies violate principles of the Chicago Convention.

IV. DECISION

We have decided to grant the Joint Applicants' request for approval of, and a grant of antitrust immunity for, alliance agreements covering air transportation between the United States and Mexico, with conditions. In arriving at this decision, we have applied the relevant policy and legal standards to the facts of the record in this case and have considered the views of the parties who have commented throughout the course of the proceeding and made some adjustments, accordingly, as explained below.

V. ISSUES RAISED IN COMMENTS

Below, we address the issues raised by commenters in response to the Show Cause Order by topic area, describe the changes to our tentative decision in response to those comments, and explain our final decision.

A. ATI's Relationship to the U.S.-Mexico Bilateral Aviation Agreement

In its comments on the record, the DGAC noted that the "Mexican Government repeatedly made clear that antitrust immunity for its carriers was a fundamental prerequisite" for agreeing to the new liberalized Agreement.[9] The DGAC went on to note that, in letters dated November 4, 2014, and July 22, 2016, the Mexican Government emphasized that granting of antitrust immunity was necessary to agree to the new liberalized regime.[10]

While the Mexican Government has taken this position in this proceeding, it is not borne out by the negotiating history. Throughout more than two years of talks, the delegation negotiating on behalf of the U.S. Government made clear it could not promise a grant of ATI, and that any application for antitrust immunity would be evaluated on its own merits. Indeed, in the Memorandum of Consultations initialed on November 21, 2014, the delegations included the following language after the delegation of Mexico noted its views on the importance of antitrust immunity:

> The U.S. delegation explained that each application for ATI is considered on its merits and is given fair and expeditious treatment by the DOT, according to well-established policies and standards. Because the DOT must, by statute, take into account the

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[9] *See* Comments of the Dirección General de Aeronáutica Civil Mexico, Nov. 16, 2016, DOT-OST-2015-0070-0077, at 7.
[10] *Id.*

> competitive market conditions contemporaneous with the filing of an ATI application, carriers should be aware of the need to take into account the availability of all essential commercial rights in a competitive marketplace and in the framework of a modernized agreement.[11]

Throughout the talks, the U.S. delegation emphasized the precedent that, as the basis for consideration of an application for ATI, all eleven elements discussed in Order 92-8-13 must be present in the bilateral relationship. These elements include, among other things, open, liberal traffic rights, including fifth freedoms, commercial rights, and liberal charter arrangements. This mutual understanding of the process by both delegations is highlighted in the exchange of letters dated May 28, 2015, discussing proposed treatment of fifth-freedom rights.[12]

The DOT letter to the DGAC states:

> If DGAC affirms the foregoing understandings, the DOT plans to consider the air services relationship between our two countries to provide all of the elements of DOT Order 92-8-13 to the airlines of both countries.

The DGAC letter to the DOT states:

> Also and because of the trends in international civil aviation, DGAC affirms that given the above understanding, the air services relationship between our two countries, namely the Agreement, should receive definite and formal consideration by the U.S Department of Transportation (hereinafter referred to as "DOT") as providing all of the elements of DOT Order 92-8-13, and therefore all analyses undertaken by DOT with regard to international airline alliance agreements and applications that involve airlines from both countries should take into account said premise.

It has been and continues to be Department policy that the presence of the elements discussed in Order 92-8-13, are a prerequisite for consideration of a grant of ATI, but they are not a guarantee of such a grant.

B. The Department's Authority to Require Divestitures in Mexico

Several commenters discussed the ability of the Department to require Delta and Aeromexico to divest MEX slots and to assign them to recipient carriers. One commenter, Frente por la Defensa de la Aviación Nacional, went so far as to imply that the action would violate the Mexican Constitution.[13] Other commenters noted that international comity would instruct that Mexican authorities should preside over the allocation of MEX slots. Still other commenters supported the Department's tentative decision regarding divestiture and slot allocation.

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[11] *See* Memorandum of Consultations, initialed Nov. 21, 2014, found at http://www.state.gov/e/eb/rls/othr/ata/m/mx/234716.htm.

[12] *See* Correspondence between Department of Transportation (DOT) and Dirección General de Aeronáutica Civil (DGAC), DOT-OST-2015-0070-0073, Nov. 4, 2016.

[13] *See* Reply Comments of Frente por la Defensa de la Aviación Nacional, Nov. 30, 2016, DOT-OST-2015-0070-0089, at 4-5.

Slot divestiture is neither a new nor unusual condition to airline mergers or grants of antitrust immunity. The Department has extensive precedent on requiring airlines to divest slots when the market conditions warrant in order to preserve competition. For example, in the U.S.-U.K. alliance case, the Department tentatively required the divestiture of 17 daily slot-pairs at LHR, although the case was later dismissed at the request of the parties.[14] Another example, cited by both opponents and proponents, is the oneworld ATI case in which we required a divestiture of four slot-pairs at LHR.[15] In that case, we found that the European Commission had similar procedures to our own to facilitate the divestiture.[16]

Compared to LHR, MEX presents a separate and unique set of issues including carrier dominance in a transborder market, and non-standard rules for slot allocation, which requires divestiture. With regard to the administration of that divestiture, the Department is finalizing its decision to require MEX slots to be divested, but unlike what some commenters have asserted, the Department will not be allocating those slots. Rather, the Department will be instituting a proceeding to determine which carriers the Joint Applicants must divest slots to through an agreement to transfer slots. The transfer of slots is permitted by AICM rules, as that organization noted in its comments.[17] While the Department is determining which carriers the Joint Applicants are to arrange the slot transfers for, the ultimate approval of those transfers continues to rest with AICM.

Further, in answer to the challenge that the divestiture is contrary to Mexican law, the Department must point out that the Joint Applicants are availing themselves of U.S. law for the purposes of obtaining antitrust immunity. The Department's grant of such authority is within its discretion, and not something that Aeromexico is entitled to as a matter of right. The grant of such authority subject to one or more conditions is not inconsistent with U.S. or, for that matter, Mexican law.[18] If the Joint Applicants are unable to comply with such a condition in a manner that is consistent with Mexican law, their failure to meet the condition will result in the ATI not becoming effective. Aeromexico is not unaware that the Department may impose conditions on its U.S. authority, as its foreign carrier permit has long been subject to numerous conditions, including one that states the Department may amend or modify those conditions.[19]

The Frente por la Defensa de la Aviación Nacional argues we should not impose our proposed divestiture because it will have an adverse effect on airline competition in Mexico. We do not agree. Indeed, the divestiture will increase competition in the Mexican airline industry, as was noted by Volaris and Interjet.[20]

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[14] *See* Order to Show Cause 2002-1-12, Jan. 25, 2002.

[15] *See* Final Order, Order 2010-7-8, DOT-OST-2008-0252, July 20, 2010.

[16] *Id.*

[17] *See* Comments of Aeropuerto Internacional de la Ciudad de Mexico, Nov. 17, 2016, DOT-OST-2015-0070-0078, at 8.

[18] We note that COFECE itself has imposed divestiture conditions on its approval of the Joint Applicants' alliance.

[19] *See* Order 91-5-25.

C. Validity of COFECE Report

In examining the record and the U.S.-Mexico aviation market for this proceeding, the Department determined that the nature of the slot regime at MEX is a significant factor to be considered before granting ATI. The Department partially relied on a staff report from COFECE[21] in tentatively finding that conditions at MEX made it necessary to require the Joint Applicants to divest slots in order to preserve and enhance competition.[22] The COFECE investigative report has not been finalized, as the Joint Applicants, AICM, and the DGAC note.[23] Indeed, COFECE has not yet issued its final recommendations for how the Mexican Government should address the anticompetitive aspects of the slot allocation regime at MEX, a facility it has deemed an essential input under Mexican law. Once COFECE issues its final recommendations, the Mexican Government will determine how they will be implemented.

The Joint Applicants, AICM, and the DGAC all spend considerable effort in their objections suggesting that the Department was incorrect to use the COFECE report to inform its analysis of the competitive situation at MEX.[24] The Joint Applicants contend that the situation at MEX has substantially changed and that it will continue to change given AICM representations in the record that MEX will soon operate under the WSGs.[25] Similar representations were made to the United States delegation throughout the course of the negotiations for the new U.S.-Mexico air services agreement over the past several years. The Department recognizes that commitment and notes that, in finalizing its decision, it has made ten MEX slot-pairs subject to an exhaustion of efforts provision. This will limit the divestiture required if the MEX slot regime allows more robust competition and promotes efficient usage, in accordance with the WSGs as planned.

Throughout the course of this proceeding the Department has asked for information on the status and details of reforms to the slot administration regime at MEX on multiple occasions and did not receive an authoritative answer from AICM. We thus proceeded using the COFECE staff report as a snapshot in time that was indicative of the conditions at MEX. We did not, however, rely exclusively on the COFECE staff report. Several carriers, both U.S. and Mexican, have filed pleadings in this proceeding that support the COFECE findings regarding the difficulty in obtaining commercially-viable MEX slots.[26] The Department has accordingly made its decision based on the best available information in the record regarding the situation at MEX at this time. Given the Department's right to alter or amend this Order at any time, along with the five-year time limit on the ATI granted, and exhaustion of efforts provisions regarding ten of the slot-pairs to be divested, the Department is satisfied that prospects for changing conditions at MEX, and in the U.S.-Mexico market more broadly, have been fairly considered.

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[20] *See* Answer of Volaris, Nov. 21, 2016, DOT-OST-2015-0070-0085, at 2; Comments of Interjet, Nov. 18, 2016, DOT-OST-2015-0070, at 2 (arguing that the tentative decision proposed too few slots divested).

[21] *See* COFECE Report Translation, DOT-OST-2015-0070-0037, Jun. 1, 2016.

[22] *See* Order to Show Cause, DOT Order 2016-11-2, at 20.

[23] *See* Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016 at 13; Comment from Aeropuerto International de la Ciudad de Mexico, DOT-OST-2015-0070-0078, Nov. 17, 2016 at 2; Comment from Dirección General de Aeronáutica Civil Mexico, DOT-OST-2015-0070-0077, Nov. 17, 2016 at 2-3.

[24] *See* Comment from Aeropuerto Internacional de la Ciudad de Mexico, DOT-OST-2015-0070-0078, Nov. 17, 2016 at 13-14.

[25] *Id.*; Comment from Aeropuerto Internacional de la Ciudad de Mexico, DOT-OST-2015-0070-0078, Nov. 17, 2016 at 6.

D. Status of Current MEX Slot Regime

AICM and the DGAC, and to some extent the Joint Applicants, have commented on the record that the slot regime at MEX as described by the Department in the Show Cause Order is neither accurate nor current.[27] They argue that the situation at the airport is not the same as was captured in the COFECE preliminary report. Carriers, including Southwest, JetBlue, and Volaris, disagree. We do as well.

AICM goes into some detail regarding its plans to implement WSG slot allocation guidelines and to install new computer software to accomplish that objective; however, those systems are not currently in place and their scope and effectiveness has not been demonstrated publicly.[28] The Joint Applicants contend that the situation at MEX has substantially changed and that it will continue to change given AICM's representations in the record that MEX will soon operate under the WSGs. As noted elsewhere, representations such as these have been made in the past, including during the course of the bilateral negotiations on the new Agreement.[29]

Throughout this proceeding, however, the Department has sought evidence from the Mexican Government about the current status of the slot allocation system at MEX. When the Department explicitly asked AICM when it planned to adopt the IATA WSGs, the DGAC responded that, "[n]o defined date exists for the implementation of a new slots regime given that this shall imply necessary modifications to the Airport Law."[30] Later, when asked what progress was being made to harmonize MEX's slot allocation system with the IATA WSGs, AICM responded on June 2, 2016, that, "On June 1, 2016, AICM shall implement a slot allocation system in place that allows for the processing of allocation requests based on the IATA WSG."[31] Then, on November 17, 2016, AICM stated that "AICM hereby declares that it undertakes to adopt those IATA WSG recommendations for slot allocations at MEX by no later than the second quarter of 2017…"[32] From this conflicting information, the Department cannot determine what, if any, aspects of the WSGs have been implemented, and cannot be confident that they will be implemented in the foreseeable future.

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[26] *See, e.g.*, Comments of JetBlue Airways Corporation, DOT-OST-2015-0070-0081, Nov. 18, 2016 at 4-5; Answer of Southwest Airlines, DOT-OST-2015-0070-0082, Nov. 18, 2016 at 3-4; Reply of Concesionaria Vuela Compania de Aviacion, S.A.P.I. d/b/a Volaris, DOT-OST-2015-0070-0058, July 15, 2016 at 6-8; Comments of ABC Aerolineas, S.A. de C.V., d/b/a Interjet, DOT-OST-2015-0070-0086, Nov. 21, 2016, at 6, 8; Reply of ABC Aerolineas, S.A. de C.V., d/b/a Interjet, DOT-OST-2015-0070-0095, Dec. 1, 2016, at 5-8.

[27] *See* Comment from Direccion General de Aeronautica Civil Mexico, DOT-OST-2015-0070-0077, Nov. 17, 2016 at 5; Comment from Aeropuerto Internacional de la Ciudad de Mexico, DOT-OST-2015-0070-0078, Nov. 17, 2016 at 5-7; Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016 at 13-16.

[28] *See* Comment from Aeropuerto Internacional de la Ciudad de México, DOT-OST-2015-0070-0078, Nov. 17, 2016, at 6 (declaring that AICM will implement SLOTIX in January 2017, and the WSGs no later than second quarter of 2017).

[29] Indeed, the Joint Applicants noted in their 2015 application that adoption of the WSG at MEX would occur by March, 2016. *See* Consolidated Reply of JetBlue Airways Corporation, DOT-OST-2015-0070-0088, Nov. 30, 2016, at 5.

[30] *See* DGAC Response on Slot Policy, DOT-OST-2015-0070-0024, Oct. 2, 2015 at 19.

In its answer, AICM also states that the airport continues to have three different opportunities for carriers to adjust their slot holdings (*i.e.,* what the COFECE report referred to as long, medium, and short-term slots): seasonally allocated slots, schedule adjustments made at least 20 business days in advance of the operation, and further schedule adjustments made at least four hours in advance of the operation.[33] AICM cites the codification of these opportunities to adjust slot holdings in the Mexican airports law and AICM's operational guidelines. As the Department found in the Show Cause Order, and COFECE noted in its report, this flexibility significantly weakens use-or-lose rules because carriers can simply cancel an operation on short notice and not have it count against their slot usage. This ability inhibits the competitive use of slots. That fact is directly relevant to the proceeding, not because the DOT wishes to opine on AICM's practices, but because we are called upon to assess competitive effects in the U.S.-MEX market and the ability of airlines to introduce new services in competition with the JV. The facts in the record show, due largely to the state of AICM rules and practice, that the likelihood of new entry is low.

There is also ongoing concern that Mexican law's prioritization of incumbents over new entrants will further hinder thorough adoption of the WSGs.[34] We also do not understand how Mexico will develop a more independent slot coordination function, given that Mexican law appears to require that AICM allocate slots. It is unclear to the Department how an effective IATA WSG-compliant slot regime can be implemented while these elements are maintained in Mexican law.

AICM and the DGAC also dispute COFECE's and the Department's finding that the slot allocation system at MEX is not transparent. They point to the fact that the laws, regulations, and rules governing slot allocation and airport operations are available to the public, online. They further state that seasonal slot allocations are listed on the AICM website. This may be true; however, COFECE's findings take issue with the way the laws, regulations, and rules are implemented (or not implemented), not their availability. Further, even though AICM does list seasonal slot allocations on its website, as stated above, Mexican law and AICM rules allow carriers to modify their slot holdings throughout the season and up to four hours before a planned operation, making seasonal allocations essentially meaningless for the purposes of our analysis.

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[31] *See* AICM Response to 2nd Evidence Request, DOT-OST-2015-0070-0038, Jun. 2, 2016, at 6.

[32] *See* Comment from Aeropuerto Internacional de la Ciudad de México, DOT-OST-2015-0070-0078, Nov. 17, 2016, at 6.

[33] *See* Comment from Aeropuerto Internacional de la Ciudad de México, DOT-OST-2015-0070-0078, Nov. 17, 2016, at 4-5.

[34] *See* Consolidated Reply of Southwest Airlines Co., DOT-OST-2015-0070-0092, Nov. 30, 2016, at 4.

The fact remains that regardless of what reforms AICM and the DGAC have implemented at MEX, it is clear that new entrant carriers have not been able to achieve meaningful competitive entry at the airport to date. As JetBlue, Southwest, and Volaris all commented, they have been unable to acquire new slots at MEX.[35] Specifically, Volaris explains in its reply, that in order to initiate new transborder services, it was forced to reallocate slots that it had been using to serve domestic Mexican markets, since it was unable to acquire new slots from AICM without going through a potentially nine-month process at AICM with no guarantee of success.[36]

AICM and the DGAC have stated on the record their intention to improve the slot allocation system at MEX through closer adoption of the IATA WSGs. However, it is far from clear when, and what aspects of the IATA WSGs will be implemented at MEX. We reiterate that COFECE has not yet even issued its final recommendations to address the anticompetitive aspects of the MEX slot regime that it identified in its report. Once those recommendations are issued, the Mexican Government will then need to decide how to address them. The Department is obligated to make a decision based on the evidentiary record as it stands today. Based on that record, we must finalize our conclusion that the MEX slot regime is unlikely to facilitate new entry, is anticompetitive, and is likely to remain so for the foreseeable future.

E. Analytical Standards

In their answer, the Joint Applicants argue that the Department erred in its tentative decision because "[the Department's] assessment of the competitive effects from the JCA at MEX bears no relationship to the Clayton Act test or traditional antitrust law principles."[37] The Joint Applicants' argument assumes that the Department's analysis of the competitive effects of an application for antitrust immunity is limited to the Clayton Act test. However, as clearly articulated in the Show Cause Order, previous ATI Orders, and noted by Southwest in its reply comments, the Department's analysis *includes* the Clayton Act test, but is not *limited* to the Clayton Act test.

As stated in the Show Cause Order, under 49 U.S.C. §§ 41308 and 41309, the Department engages in a two-step analysis of foreign air transportation agreements submitted for our approval. We first examine the application under § 41309(b) to determine whether the agreement(s) are adverse to the public interest because they would substantially reduce or eliminate competition (the "Competitive Effects Analysis"). Because antitrust-immune joint ventures allow carriers to achieve merger-like efficiencies, as part of our competitive analysis, the Department also examines the application under the Clayton Act test. The Department's public interest analysis under both §§ 41309(b) and 41308(b) entails a balancing of any anticompetitive effects and public benefits.[38]

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[35] *See, e.g.*, Comments of JetBlue Airways Corporation, DOT-OST-2015-0070-0081, Nov. 18, 2016 at 4-5; Answer of Southwest Airlines, DOT-OST-2015-0070-0082, Nov. 18, 2016 at 3-4; Reply of Concesionaria Vuela Compania de Aviacion, S.A.P.I. d/b/a Volaris, DOT-OST-2015-0070-0058, Jul. 15, 2016 at 6-8; Comments of ABC Aerolineas, S.A. de C.V., d/b/a Interjet, DOT-OST-2015-0070-0086, Nov. 21, 2016, at 6, 8; Reply of ABC Aerolineas, S.A. de C.V., d/b/a Interjet, DOT-OST-2015-0070-0095, Dec. 1, 2016, at 5-8.

[36] *See* Reply of Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. d/b/a Volaris, DOT-OST-2015-0070-0093, Nov. 30, 2016, at 3.

[37] *See* Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016, at 29.

The Department must, in order to protect the public interest, not examine just the effects of the proposed alliance, but also the environment in which that alliance will operate, to ensure that there will be adequate competition to not only mitigate any potential harm from the proposed transaction, but to guarantee that the anticipated public benefits are likely to be realized. The Department did conduct an in-depth competitive effects analysis, including but not limited to the Clayton Act test, to assess market power and the likelihood of potential new entry in key markets.[39] The Department determined that the Joint Applicants would be able to exert market power between the United States and MEX, and that, without divestitures, new entry is unlikely to occur. The record in this case clearly demonstrates that MEX is a primary market, particularly for transborder air service in Mexico.

Further, several carriers have argued on the record, and COFECE's Investigative Authority found, that MEX is subject to an anticompetitive slot allocation regime that hinders competitive new entry. Given the facts of this case, and applying the decisional standards described in the Show Cause Order, the Department has determined, consistent with its findings in prior cases,[40] that the public benefits of the alliance can only be realized if there is sufficient competitive entry during the period that the current anticompetitive slot regime is in place. These divestitures are therefore designed to ensure that there is adequate competition to outweigh the harm caused by the Joint Applicants' market power at MEX in order that the benefits of the alliance are passed on to consumers, given the barriers to entry caused by the slot regime at MEX, documented extensively in the record of this proceeding.

F. Cancun Access

Southwest provided evidence in its answer that Cancun International Airport (CUN) does, in fact, have a locally-imposed slot regime by which carriers must obtain arrival and departure approval from the airport operator. As a remedy, Southwest proposes that the Department require the IATA WSGs to be implemented at CUN within one year of ATI becoming effective, include CUN in an annual review of airline access and competition in Mexico, and ensure that CUN takes concrete steps to prevent Delta's Saturday schedule from inhibiting additional daily low-fare service.[41]

The Department notes, however, that Southwest is the only carrier in this proceeding that has raised access to CUN as an issue. As a condition of ATI, the Department does not have the authority to impose remedies on a third party (in this case, Grupo Aeroportuario del Sureste (ASUR), the operator of CUN), independent of the Joint Applicants. While the Department empathizes with Southwest's frustration, this ATI proceeding is not the proper venue to address those concerns.

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[38] *See* Order 2016-11-2 at 8-9.

[39] *See* Order 2016-11-2 at 9-18.

[40] *See e.g.*, Order 2002-1-12, Order 2010-7-8.

[41] *See* Answer of Southwest Airlines Co., DOT-OST-2015-0070-0082, Nov. 18, 2016, at 13.

G. Access to O&D Survey Data

The Department remains unconvinced by Hawaiian's comments related to making O&D survey data of foreign carriers available to independent carriers. As Hawaiian and the Department have pointed out, implicit in the grant of antitrust immunity between a U.S. carrier and their foreign partner(s) is their ability to share information related to network planning and revenue management activities. Each participant is able to bring its own expertise and market intelligence into the arrangement. It is the Department's view that this exchange of information is a driver of the partnership's ability to generate public benefits. As noted in the Department's Show Cause Order, Hawaiian has access to more data than do any immunized partners despite the fact that immunized foreign carriers can share their own data with their U.S. partner. Foreign carriers are not able to share data with their U.S. partners from other foreign carriers while Hawaiian does have access to all O&D (including foreign itineraries) submitted by U.S. carriers.

Therefore, the Department upholds the finding in the Show Cause Order and determines that the Department should maintain the same collection procedure for the foreign carrier-submitted international O&D. We are not persuaded by Hawaiian to make a change in the established policy, which we believe protects competition and promotes U.S. carrier interests, including Hawaiian's.

H. Conditions of Final Approval and Grant of Antitrust Immunity

The Show Cause Order tentatively approved the alliance, subject to the following conditions:

1. The divestiture of 24 slot-pairs at MEX and six (6) slot-pairs at JFK;
2. A five-year time limit to the grant of ATI;
3. The removal of exclusivity clauses in the alliance agreements;
4. Annual reporting to the Department on the alliance's public benefits and commercial development;
5. O&D survey data reporting;
6. Withdrawal from IATA tariff coordination; and
7. The obligation to seek prior approval of any common branding.[42]

We hereby make final our tentative decision to impose all of the above conditions, with modifications to the implementation of the divestitures at MEX and JFK, and the size of the divestiture at JFK, as discussed below.

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[42] *See* Order 2016-11-2 at 33-35.

1. MEX Divestitures

In the Show Cause Order, the Department tentatively found that a slot remedy was necessary at MEX in order to facilitate the minimum level of competition necessary to ensure the proposed alliance was net-positive for the public interest. The Department's proposed remedy requires that 24 MEX slot-pairs be divested.

The Department sought and received comments on both the size and terms of the divestiture. The Joint Applicants, Mexican aviation unions, AICM, and the DGAC all objected to the size of the divestiture. The Joint Applicants argued that it was disproportionate to any actual or potential harm caused by the proposed alliance. The Mexican unions, AICM, and the DGAC argued that the divestiture was unnecessarily punitive and would have adverse effects on Aeromexico, Mexican aviation generally, and foreign relations between the United States and Mexico. JetBlue suggested that the divestiture be phased-in over the course of three years. Southwest opposed this suggestion.

The Department affirms its tentative decision to require the divestment of 24 slot-pairs.[43] As explained in the Show Cause Order, this remedy reflects the eight (8) slot-pairs that constitute the immediate concentration of the Joint Applicants at MEX post-transaction (consistent with COFECE's remedy), as well as 16 additional slot-pairs to provide adequate competition to ensure that public benefits from the Joint Applicants' planned growth at MEX are realized by ensuring sufficient competitive entry.[44] As part of their application, the Joint Applicants provided detailed plans for growing transborder services if the JV is approved.[45] Based on the evidence in the record, these services can, and likely will, be introduced under the existing slot regime which the COFECE report deemed anticompetitive and a barrier to an essential input (*i.e.,* MEX). In order to ensure that both the price and service benefits of the Joint Applicants' new services are passed along to consumers, DOT seeks to foster the requisite competition by enabling new entry.

AICM and the DGAC state that they intend to make improvements to the slot allocation system at MEX, despite the fact that it has not yet seen COFECE's final recommendations, nor has it had an opportunity to respond to them. We will therefore alter our decision and require that only 14 slot-pairs be divested immediately.[46] Through a subsequent proceeding in this docket, the Department will adopt an assignment of all 24 slot-pairs; however, for the last ten pairs, the acquiring carriers will need to demonstrate that they have exhausted reasonable efforts to obtain slots through AICM's slot allocation procedures in the next practicable IATA scheduling season

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[43] The Department's remedy contemplates the divestiture of slot-pairs for year-round use (i.e., summer and winter seasons).

[44] *See* Order 2016-11-2 at 21.

[45] *See* Confidential Document Production at DL000812, DL-R-0006.1; Answer of Southwest Airlines Co., DOT-OST-2015-0070-0050, July 7, 2016, at 8.

[46] The Department would seek to allocate the initial 14 slot-pair divestitures such that they would also satisfy the COFECE remedy requirements. *See* discussion of remedy compatibility in Order 2016-11-2, at 26-27.

(likely the Northern Summer-2018 season) after the initial 14 divestitures.[47] If the acquiring carriers are unsuccessful, the Joint Applicants would then need to supply the remaining slots. We believe this modification to our remedy strikes a balance amongst the tripartite goal of: ensuring sufficient competitive access to MEX, recognizing the Mexican Government's efforts to implement reforms to the slot allocation system at MEX, and limiting the impact to the Joint Applicants to the greatest extent possible. Further, in response to comments on the issue of hourly limits, we have decided that the Joint Applicants should not be obligated to transfer more than six (6) slots per hour during the hours that the airport authority has declared as saturated. The Joint Applicants, however, may designate two non-consecutive hours during the saturated period in which they will not be obligated to transfer more than four (4) slots per hour. This approach enables competitors to operate schedules that are commercially viable while at the same time avoiding any significant disruptions to the Joint Applicants' existing schedules and ability to operate a hub at MEX.

We note Interjet's argument that our remedy does not go far enough and that the Department should require the divestment of at least 36 slot-pairs at MEX. We understand the carrier's desire to secure additional access at this important but congested facility. However, given the timeframe of the approval (*i.e.,* five years), the Department's analysis cannot support the higher figure proposed by Interjet. The Department believes that the divestiture of 24 MEX slot-pairs is proportional given the Joint Applicants' ability to exert market power between the United States and MEX, and the uncertainty of reform of the current anticompetitive slot regime at MEX.

Southwest also commented that the Department should require that commensurate gates and ground facilities, including remain-overnight (RON) parking positions if necessary, must be divested along with slots in order to ensure competitive service can be initiated. The record indicates that the operational authority conferred by a slot at MEX entails the right to use all necessary associated infrastructure and services of the airport.[48] As our remedy is predicated on the ability of carriers to enter the market and provide competitive service, if they are not able to do so because of facility or other constraints even after acquiring the necessary slots, the effectiveness of the remedy would be moot and the Department would have to reconsider its grant of ATI.[49]

Southwest has also argued that the Department should limit eligibility to receive the divested MEX slots to U.S. LCCs, thereby excluding the Mexican LCCs that the Department tentatively determined should be eligible. Southwest argues that Mexican airlines already hold the vast majority of MEX slots and do not need or deserve more slots through the Department's divestiture process. Southwest states that Volaris and VivaAerobus have 58 and 36 slot-pairs, respectively.[50] In a related argument, Interjet and American both object to their exclusion from

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47 The initial 14 MEX and two JFK slot-pairs may be referred to as the "phase one" slots, the remaining ten MEX and two JFK slot-pairs are the "phase two" slots.

48 *See* DGAC Response on Slot Policy, DOT-OST-2015-0070-0024, Oct. 2, 2015, at 11-12.

49 The Department notes that AICM must approve all slot transfers. Based on evidence in the record, this appears to be a straightforward, administrative action. However, should AICM delay the approval of, or ultimately deny the transfers, the Department's remedy would likewise be moot.

50 *See* Answer of Southwest Airlines Co., DOT-OST-2015-0070-0082, Nov. 18, 2016 at 5.

the Department's remedy.[51] Interjet argues that while it does hold 26.8 percent of the slots at MEX, it has less than 5.5 percent of the U.S.-Mexico transborder market; less than Volaris, Southwest, and Alaska, carriers that the Department tentatively determined are eligible to receive MEX slots.[52] American argues that the remedy should be open to all carriers, not a subset selected by the Department.

The Department disagrees with Southwest, Interjet, and American. The Department's remedy is focused on providing access at MEX to carriers that do not have it, and have demonstrated that they cannot achieve it otherwise, in order for them to provide competitive service, disciplining the JV. Southwest has provided no evidence to demonstrate that the competition provided by Mexican LCCs is any less vigorous or of any less quality than that provided by U.S. LCCs. Interjet and American's arguments that they should be eligible to receive MEX slots are misplaced. As stated above, the objective of the Department's remedy is to inject sufficient competition at MEX to discipline the dominant position of the Joint Applicants at MEX. The Department believes that the most efficient way to do this, requiring the least number of divestitures, is to link LCC and low-fare carrier networks to MEX, thereby ensuring adequate network competition. We then determined the eligibility of LCC and low-fare carriers based on their level of slot holdings at MEX, and their ability and willingness to launch competitive service in a timely fashion. By its own admission, Interjet has over 26% of the slots at MEX, more by far than any other carrier besides Aeromexico. Interjet does not need assistance to achieve competitive access at MEX; it already has it. As discussed below, the Department will adopt a similar approach at JFK.

American, on the other hand, is not an LCC or low-fare carrier. As explained above, one of the overriding goals the Department pursued in crafting its remedy was to minimize the remedy's impact on the Joint Applicants. The Department determined that limiting the eligibility to receive divested slots to LCC and low-fare carriers was the best way to achieve this goal. As stated in the Show Cause Order, the Department has previously found that LCCs exert the greatest competitive impact when entering constrained markets.[53] Therefore limiting eligibility to those carriers would require the least slots to achieve the requisite competition needed to remedy the transaction. Permitting American and other legacy carriers to participate in the divestiture would compel us to require a larger slot divestiture, thereby jeopardizing the viability of the alliance and its public benefits.

The DGAC also argues that the Department erred in not considering Toluca as a substitute airport for MEX and believes the Department should lower its MEX remedy accordingly. There is no evidence in the record to indicate that Toluca is a suitable substitute for MEX. Just the fact that an airport exists in relative proximity to another does not make it substitutable. The Department examined airline schedules beginning in January, 2014. During that time, the entirety of U.S.-Toluca service consisted of less-than-daily service.[54] No U.S.-Toluca passenger service has existed since May, 2016, and no carrier has filed any future schedules to reintroduce U.S.-Toluca service at least through December, 2017.[55]

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[51] In Interjet's case, only at MEX.

[52] *See* Comments of ABC Aerolineas, S.A. de C.V., d/b/a Interjet, DOT-OST-2015-0070-0086, Nov. 18, 2016, at 10.

[53] *See* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 76 FR 63702, Oct. 13, 2011 at 63705.

2. JFK Divestitures

In their objections to the Show Cause Order, the Joint Applicants argue that the Department erred in its analysis of the competitive effects of the alliance on the JFK-MEX overlap route. Specifically, they contend that the proper scope of analysis is the New York City-Mexico City city pair, and that EWR should be considered as part of the New York City market. They argue that there are no barriers to entry at EWR given the airport's recent change of designation from IATA Level 3 (slot controlled) to Level 2 (schedule facilitation), and that it is an appropriate substitute for JFK. The Joint Applicants also argue that there are no barriers to entry at JFK and that, as a result of the new liberalized air services agreement between the United States and Mexico, more carriers are likely to introduce service in the near future. The Joint Applicants also note the expected financial and commercial impact that divestitures will have on Delta's hub operation at JFK.

The Department acknowledges that for some, but not all, passengers, EWR is a substitute airport for JFK. The airports have overlapping, but not identical, catchment areas; the two airports are not perfect substitutes that can be freely interchanged. As the Department of Justice pointed out in its recent antitrust complaint against United at EWR, "Airlines do not view service at other airports as reasonable substitutes for the service offered at Newark, and thus they are unlikely to switch away from slots at Newark in response to a small but significant increase in the price of slots. Thus, slots at Newark constitute a relevant market under the antitrust laws."[56]

Further, a regional air service demand study conducted by the Federal Aviation Administration (FAA) shows that the distribution of passenger origins vary among New York/New Jersey area airports. In contrast to both LaGuardia (LGA) and JFK where more than 40 percent of passengers surveyed originated in Manhattan, only 16 percent of EWR passengers originated in Manhattan.[57] This study also found JFK to be the only airport that includes all five boroughs of New York City within its service area.[58] The study concludes: "This analysis shows that passengers who use the New York airports (JFK and LGA) are less likely to consider EWR as an alternative to one of the two New York airports. EWR passengers are less likely to consider using a New York Airport, but when they do, they are more likely to consider JFK than LGA."[59]

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[54] OAG schedule data for Jan., 2014-Dec., 2017. As published Dec., 2016.

[55] *Id.*

[56] *See* United States of America v. United Continental Holdings, Inc. (D. N.J.), Verified Complaint, Case 2:15-cv-07992-WHW-CLW Document 1 Filed 11/10/15, ¶ 30.

[57] https://www.faa.gov/airports/eastern/planning_capacity/media/panynj-task-b-and-d-final-may-2007.pdf at I-8

[58] *Id.*, at I-12

[59] *Id.*, at III-26.

EWR's recent designation change to a Level 2 schedule facilitated airport is not a complete solution for access as the Joint Applicants claim. As stated in the notice announcing EWR's change to Level 2, "approval of new or retimed operations must avoid significant schedule peaking and allow for recovery to avoid causing a consistent level of unacceptable delay… The FAA intends, if necessary, to deny schedule submissions that exceed the declared airport runway capacity…" and "while the FAA is responsible for managing the airport's runway capacity, there are terminal, gate, and other operational factors that may require schedule adjustments."[60] While some new entry has been possible at EWR, the airport is still congested and not all requests for access are likely to be approved.

It is also telling that during the schedule submission period for both the Winter-16/17 and Summer-17 IATA scheduling seasons, no Mexican carrier requested schedule approval at EWR. In fact, no Mexican carrier has served EWR since Mexicana Airlines ceased its EWR-MEX service in June, 2004. There is a clear, revealed preference for Mexican carriers, and therefore presumably their passengers, to access New York City via JFK. This is evidenced by the fact that Interjet and Volaris serve JFK at off-peak, non-slot controlled times, rather than seek access to EWR at more commercially-viable times.

The Joint Applicants also claim that new JFK-MEX service is likely to be introduced because the limitation on the number of carriers providing service on a route has been removed under the new U.S.-Mexico air services agreement. This argument, however, ignores the fact that, in order to commence JFK-MEX service, a carrier must not only have slots on both ends of the route, but *coordinated* slots. The record clearly indicates that carriers have been unable to obtain any slots at MEX, let alone the specific slots needed to facilitate commercially-viable JFK-MEX service.

The Joint Applicants point out that Volaris will soon begin service on the JFK-MEX route which constitutes new entry by a fourth carrier in the airport-pair market (pre-transaction). Although the proposed times are during non-slot controlled early morning hours limiting its competitive impact for time-sensitive business travelers, the carrier's low-cost business model will offer new competition for price-sensitive passengers. Further, the Department recognizes that, unlike MEX slots, there is a secondary market for JFK slots.

This new, even if limited, competition for a subset of consumers, as well as the fact that slot divestitures themselves have a significant monetary impact on the divesting carriers, has led the Department to lower its divestiture requirement at JFK to four (4) slot-pairs.[61] This number comports with Aeromexico's existing complement of JFK slots used to serve Mexico City. We have further decided to limit to two (2) the number of slots that must be divested in the peak-hours at JFK of 1500-2059. This will limit the loss of what are presumably the most financially and operationally valuable slots to the Joint Applicants. It will also alleviate the impact that the divestitures will have on the Joint Applicants' trans-Atlantic hub operation at JFK.

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[60] *See* Change of Newark Liberty International Airport (EWR) Designation, Federal Aviation Administration, Apr. 6, 2016. 81 FR 19861, at 19862.

[61] Carriers receiving divested JFK slots, as well as the Joint Applicants as the current holder(s) of the slots, must apply to the FAA for a waiver from the Order Limiting Operations at JFK in order to permanently transfer the slots.

Additionally, similar to our adjusted MEX remedy above, we will make two of the slot-pairs subject to exhaustion of efforts whereby the acquiring carriers would need to demonstrate that they have exhausted reasonable efforts to obtain slots from the airport's slot coordinator, by the next practicable IATA scheduling season (likely the Northern Summer-2018 season) after the initial divestiture. If they are unsuccessful, the Joint Applicants would then need to supply the remaining slots. Unlike MEX slots, slots at JFK do not automatically confer access to necessary ground services and terminal facilities. Carriers receiving JFK slots will likewise have to demonstrate that they have exhausted reasonable efforts to seek accommodation for terminal space and other necessary infrastructure, including by availing themselves of any applicable lease terms at JFK. Should they prove unable to find adequate accommodation, the Joint Applicants will be expected to provide it.

The primary competitive problem posed by the transaction in the context of the existing slot regime at MEX is the degree of market power that the Joint Applicant's would have in the United States-MEX market. The Department's MEX remedy has therefore focused on the need to adequately link competing LCC networks to MEX in order to discipline the joint venture in transborder markets. The Show Cause Order, as well as the response of the Joint Applicants, acknowledged that JFK-MEX is the only nonstop air services market that raises competitive concerns, requiring a route-specific remedy. The importance of this market (linking the two largest cities in North America where the preponderance of traffic has a revealed preference for nonstop services) was discussed in detail in the Show Cause Order. As a result, the Department's divestitures at JFK are specifically designed to address competition in this nonstop market and the Department will give preference in assigning JFK slots to proposals for nonstop service between JFK and MEX.

3. Time Limit

The Department tentatively proposed in the Show Cause Order that its grant of ATI should be subject to a five-year time limit. The Joint Applicants would then need to submit a *de novo* application prior to the expiration of the five year term for a possible renewal of ATI. In response to the Department's tentative decision, the Joint Applicants argued that no other grant of ATI has carried such a condition, and that a five year grant would negatively affect their ability to make long term investments.[62] The Joint Applicants contend that many of the public benefits expected to accrue from an immunized alliance rely on a shared incentive to develop the alliance to maximize long term benefits, in particular an incentive "to invest in joint operations, modify route structures, and otherwise achieve pro-consumer modifications."[63] They argue that a five-year term would have a chilling effect on the Joint Applicants' willingness to make the investments necessary to achieve those benefits. The Department does not agree and notes that Delta already has an equity stake in Aeromexico, and is separately seeking approval to increase that stake to 49 percent.

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[62] *See* Reply of the Joint Applicants, DOT-OST-2015-0070-0091, Nov. 30, 2016, at 26.

[63] *See* Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016, at 39.

As JetBlue noted in its response, there are many recurring obligations for airlines under the Department's regulations, including two-year exemptions, limited entry route awards, and continuing fitness reviews. It is also common practice in foreign jurisdictions to place time limits on alliance authorizations.[64] Accordingly, the Joint Applicants are not unfamiliar with structuring and planning investments when facing an eventual need to renew. While the Department has not previously imposed firm time limits on grants of ATI, it has always retained the ability to alter or amend its grant of ATI at any time if the Department believes a change in competitive circumstances has occurred.[65] In this case, we find that, in light of the circumstances presented, it is necessary to impose a definite time for review.

The Department observed in its Show Cause Order that conditions at MEX serve as a barrier to entry to the market.[66] The Joint Applicants spent much time in their comments arguing that those conditions have changed or will change, based on the representations of AICM.[67] While the Department is optimistic regarding AICM's anticipated move towards complying with the WSGs, the uncertainty surrounding current conditions and the potential condition of the slot regime in the near future requires the Department to finalize the five year time limit.

Southwest restated its position that the grant of ATI should be subject to a three year time limit rather than the five years tentatively proposed by the Department.[68] It argues that five years is too long because the Joint Applicants will be entrenched in a dominant position by the time the ATI expires if the MEX slot regime is not reformed immediately.[69] The Department finds that three years is too short a time frame for the public benefits of ATI to accrue. It will take time for the Joint Applicants to fully integrate their businesses and fully achieve the maximum consumer benefits. A three-year time limit is too short a time for such a review. The Department notes that it retains the ability to alter or amend its grant of ATI at any time so that harsh competitive effects like those Southwest warns about can be mitigated if necessary. The five year time limit is accordingly the best balance of interests to permit the Joint Applicants to fully pursue the benefits of ATI while allowing the Department an opportunity to fully reexamine its decision in light of that implementation and the subsequent changing marketplace.

The U.S.-Mexico market is rapidly changing and will likely continue to do so as airlines and consumers adapt to the new liberalized marketplace. At the same time, the uncertainty surrounding the slot regime at MEX could mean that "the Department would have to carefully consider whether it could approve a new application if tendered, and, if it were to do so, whether additional divestitures would be necessary."[70] The competitive balance and the policies governing allocation of slots at MEX are fluid and the Department needs to retain the ability to fully reexamine the basis for granting ATI. Accordingly, the Department finalizes its decision to set a five-year time limit on its grant of ATI.

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[64] *See* Comments of JetBlue Airways Corporation, DOT-OST-2015-0070-0081, Nov. 18, 2016, at 7-8.

[65] 49 U.S.C. § 41309(b)(1).

[66] *See* Order 2016-11-2, at 27.

[67] *See* Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016, at 12.

[68] *See* Answer of Southwest Airlines, DOT-OST-2015-0070-0082, Nov. 18, 2016, at 10-11.

[69] *Id.*

[70] *See* Order 2016-11-2, at 27.

4. Exclusivity Provisions

The Joint Applicants argued that the Department's requirement to remove exclusivity provisions from their alliance agreements is inconsistent with precedent and harmful to consumers. They state that "DOT's proposal to strike the exclusivity provisions in the JCA operating agreements is an unprecedented assault on a highly procompetitive aspect of the proposed JCA."[71] The Department disagrees on both counts. The requirement is not unprecedented. The Department has previously required the elimination of provisions in alliance agreements that would allow one partner to unilaterally prevent procompetitive activities by the other partner.[72] Further, a provision that enables parties to prohibit competitive access for third-party carriers cannot be deemed "procompetitive."

As stated in the Show Cause Order, we recognize the importance of ensuring that the parties work together in order to achieve success in the joint venture. However, the Department will not endorse provisions in alliance agreements that allow either partner to prevent procompetitive activities by the other partner.

I. Slot Assignment Proceeding: Next Steps

Following this Final Order on the merits of the application, the Department intends to conduct a selection process in this docket. It is important that we move quickly to transfer the slot-pairs to be divested at MEX and JFK. Expedient transfer will enable competitors to introduce new services in the U.S.-Mexico market in parallel with the Joint Applicants' implementation of the joint venture, which the Department would aim to facilitate as soon as possible. COFECE's approval of the joint venture also requires prompt implementation. Based upon COFECE's final resolution, COFECE requires that the Joint Applicants implement the joint venture no later than May 17, 2017. Of particular importance, COFECE's approval is conditioned upon the transfer of eight slot-pairs subject to terms that are not being adopted by DOT. Notably, the eight slot-pairs identified by COFECE:

- Must be transferred, with approval by AICM, by May 17, 2017;
- Must be notified to COFECE;
- May be transferred to a list of carriers that is broader than the list of eligible carriers established by the Department; and
- May not be reacquired generally by the Joint Applicants for a period of 10 years.[73]

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[71] *See* Objections of the Joint Applicants, DOT-OST-2015-0070-0084, Nov. 18, 2016, at 39.

[72] *See* Order 2010-2-8 at Confidential Appendix B.

[73] *See* COFECE Plenary Translation, DOT-OST-2015-0070-0037, Jun. 1, 2016.

As explained in the Show Cause Order and below, the Department's broader remedy of 24 MEX slot-pairs and four JFK slot-pairs takes into account these terms and is compatible with COFECE's approach.

There are a number of steps needed for the Joint Applicants to implement the joint venture, but they need not take long. The first step is for the Joint Applicants to confirm that they intend to implement the joint venture as conditioned by the Department. A similar step was required by COFECE earlier this year. We are requiring the Joint Applicants to file written notice in the docket indicating whether they accept all terms and conditions described in this Final Order, including Appendix A, within seven (7) business days from the service date of this Order. One condition requires the Joint Applicants to amend the alliance agreements to remove exclusivity clauses. The Joint Applicants need not complete that step as quickly; they may comply any time prior to the joint venture's actual implementation date.

If the Joint Applicants accept all terms and conditions, the Department will take the next step of promptly issuing a notice instituting a selection process to assign the available MEX and JFK slots for both the initial Phase One slots, as well as the Phase Two slots that are subject to exhaustion of efforts at both airports. The notice would request proposals and provide the details that airlines should provide in their proposals, which will include, at a minimum:

- Key terms: requested timings, number of frequencies, routes intended to be served, proposed start date and schedule, and aircraft to be operated; and
- Business and operational plans: pricing structure, service offerings, and transborder network plan.

The Department intends to make proposed selections in a show-cause order and final selections in a final order. Mindful of the need for expedition, abbreviated answer and reply dates are likely at each phase of the selection process. With regard to the second phase of slots that would be transferred in time for use in the IATA Northern Summer-2018 season, if the carriers selected are able to obtain suitable slots from the slot administrators, the Joint Applicants will not be obligated to transfer the requisite number of slots and the overall slot divestiture of 24 MEX and 4 JFK slots will be credited and adjusted down accordingly.

Given the May 17, 2017, COFECE deadline, the Department encourages airlines interested in obtaining slots in this process to approach Mexican and United States authorities promptly to discuss the processes for obtaining necessary economic, safety, and operational approvals to launch services with remedy slot-pairs. Additionally, we note that the Joint Applicants are obligated to notify COFECE which slot-pairs are transferred pursuant to COFECE's remedy and that those slots will be subject to the unique terms and conditions imposed by COFECE.

Once the Department makes selections, we will require the Joint Applicants to enter into slot transfer agreements and to seek prior approval of those agreements before they may be executed. The Department will take into account proposed service dates in its evaluations of the proposals. Services introduced in parallel with the Joint Applicants' services will exert competitive discipline in the market faster than services introduced at a later date. Except as limited by the COFECE remedy, the Department's remedy does, however, allow the Joint Applicants to execute slot transfer agreements that enable competing airlines, at their option, to begin using the slots at future dates. The dates must be reasonably close in time to the date the slot transfer agreements are executed. The Department finds that this allowance is necessary given the need for competing airlines to obtain economic, safety, and operational approvals and to ensure proper time for competing airlines to prepare for the introduction of new international flights.

The Joint Applicants' antitrust immunity will become effective once the slot transfer agreements for the initial round of 14 MEX slot-pairs and 2 JFK slot-pairs have been approved by the Department, executed by the parties, and approved by the slot coordinators, and once the requirements for the COFECE remedy have been met. The Joint Applicants should submit a notice to the record indicating the date the Joint Applicants completed execution of the slot transfer agreements, and received AICM or FAA approval of the transfers as applicable, for the first 14 MEX slot-pairs and the first two (2) JFK slot-pairs described in Appendix A to this Order. The filing of such notice automatically triggers the effectiveness of the antitrust immunity. The five-year limit on the antitrust immunity will run from the date of the notice submitted by the Joint Applicants.

With regard to these second phase slot-pairs, the Department's notices and orders will provide additional details on applicable dates and processes to be followed by the Joint Applicants and the competing airlines eligible to obtain the slots. The competing airlines will be expected to approach AICM and the FAA to apply for slots using the applicable procedures at those facilities and subject to the normal deadlines established by each slot coordinator. The competing airlines must submit a written request for slots detailing the specific times requested, and should file those requests in this docket, as well. If they do not receive a complete response, or are not granted slots within a 60-minute window of their requests, the Department will consider that the competing airlines have exhausted all reasonable efforts to obtain slots. At this point, the Joint Applicants' obligation to transfer remedy slots as a condition of maintaining their antitrust immunity will be triggered. The Department will notify the Joint Applicants if they are obligated to provide these remedy slots. Before that notification, it would be prudent for the competing airlines to notify the Joint Applicants of their timing requests to AICM and the FAA, and for the Joint Applicants to identify appropriate slots and prepare for a potential slot transfer.

A summary of the steps and timeline is provided in the table below:

Timeline	
Step 1	Joint Applicants indicate their acceptance or rejection of the terms and conditions – within 7 business days of the issuance of this Final Order.
Step 2	DOT issues an instituting notice requesting proposals for remedy slots.
Step 3	DOT selects eligible carriers to receive remedy slots in show-cause and final orders.
Step 4	The Joint Applicants and carriers receiving Phase 1 slots negotiate slot transfer agreements and the Joint Applicants seek prior approval of the agreements prior to execution.
Step 5	The Joint Applicants submit a notice on the record indicating the date the execution of the Phase 1 slot transfer agreements are complete and approved by the slot coordinators, and the date that the Joint Applicants will implement the JV. The antitrust immunity is effective from the date of the notice.
Step 6	The Joint Applicants prepare for a potential transfer of Phase 2 slots.

ACCORDINGLY:

1. Subject to the ordering paragraphs below, we approve and grant antitrust immunity to alliance agreements between Delta Air Lines, Inc. (along with its affiliate Endeavor Air, Inc.) and Aerovías de México, S.A. de C.V. (along with its affiliate Aerolitoral, S.A. de C.V.), insofar as such agreements relate to foreign air transportation;[74]

2. We direct the Joint Applicants to file a notice in this docket within seven (7) business days from the service date of this Order, indicating their acceptance or rejection of the Department's decision, including all remedies and conditions contained in this Order and its Appendix A;

3. The approval and grant of antitrust immunity shall become effective upon the date on which the Joint Applicants submit a notice on the public record in this docket stating the following information:

   a. The date upon which the Joint Applicants completed execution of the slot transfer agreements, and received AICM or FAA approval of the transfers as applicable, for the first 14 MEX slot-pairs and the first two (2) JFK slot-pairs described in Appendix A to this Order;

   b. The implementation date of the Joint Cooperation Agreement; and

[74] The alliance agreements shall mean those referred to in footnote 2 of this Order.

c. A statement that COFECE's conditions have been met;

4. The approval and grant of antitrust immunity shall expire five (5) years from the date upon which the Joint Applicants submit the notice described in Ordering Paragraph 2;

5. We determine that the Joint Applicants shall divest up to 24 slot-pairs at Mexico City's Benito Juarez International Airport (MEX) and up to four (4) slot-pairs at New York's John F. Kennedy International Airport (JFK), subject to the processes, terms, and conditions set forth in Appendix A to this Final Order;

6. We direct the Joint Applicants to submit for prior approval all slot transfer agreements required by Appendix A to this Final Order as well as any subsequent subsidiary agreements implementing the alliance;[75]

7. We direct the Joint Applicants to obtain prior approval if they choose to hold out service under a common name or use common brands;

8. We direct the Joint Applicants to revise the Joint Cooperation Agreement as directed in Ordering Paragraph 6 of the November 4, 2016, Order to Show Cause issued in this docket, and provide the Department a complete and unredacted copy of the most recent and updated Joint Cooperation Agreement and any appendices prior to the agreement's implementation;

9. We direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the effective date of ATI, and continuing each year thereafter while the alliance agreements are effective;[76]

10. We direct Delta Air Lines, Inc. and Aerovías de México, S.A. de C.V. to withdraw, or remain withdrawn, from participation in any International Air Transportation Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal of, to participate in similar alliance activities with a U.S. airline(s);

11. We delegate to the Director of the Office of International Aviation the authority to determine the applicability of the directive set forth in the preceding paragraph as to

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[75] Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all unredacted contractual instruments that implement or materially alter, modify, or amend cooperation agreements, joint ventures, slot transfer arrangements, or confidentiality/antitrust guidelines. Any appropriate documents shall be submitted to the Director of the Office of Aviation Analysis.

[76] We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If that date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;

12. We direct Aerovías de México, S.A. de C.V. to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;[77]

13. We may amend, modify, or revoke this authority at any time, without hearing;

14. We defer action on all motions for confidential treatment submitted in this docket to date;

15. The Department will not entertain petitions for reconsideration of this Order; and

16. We will serve this Order on all parties on the service list for this docket.

By:

JENNY T. ROSENBERG
Acting Assistant Secretary for
Aviation and International Affairs

(Seal)

An electronic version of this document is available online at www.regulations.gov.

[77] We expect applicants to report the O&D data beginning with the first full quarter following the date of the issuance of a Final Order. Detailed instructions are available from the Department's Office of Airline Information at the Bureau of Transportation Statistics. We treat the foreign airlines' O&D data as confidential, do not allow U.S. airlines any access to the data, and do not allow foreign airlines any access to U.S. airline O&D Survey data. We use these data only for internal analytical purposes.

SLOT DIVESTITURES

In consideration of United States Department of Transportation ("DOT") approval of the alliance agreements submitted in Docket DOT-OST-2015-0070, and a grant of antitrust immunity, Delta Air Lines, Inc. and Aerovias de Mexico, S.A. (together, the "Joint Applicants") commit to transfer to eligible competitors certain landing and takeoff authorizations ("slot-pairs" or "slots"[78]) at Mexico City's Benito Juarez International Airport ("MEX") and New York's John F. Kennedy International Airport ("JFK"). The Joint Applicants shall transfer the slot-pairs for use in the United States-Mexico air services market subject to terms and conditions specified in the attached Final Order, in this Appendix, and in subsequent notices or orders published in the docket. DOT's notices or orders will determine the eligibility of competitors to receive the slot-pairs and make selections for the Joint Applicants to follow. Each eligible competitor receiving slot-pairs ("Selected Carrier") shall comply with the terms and conditions applicable to the request, receipt, use, and subsequent transfer of the slot-pairs.

1. Number of Slot-pairs

a. **MEX** - The Joint Applicants shall make available to eligible competitors twenty-four (24) slot-pairs for year-round use at MEX in two phases:

   i. **Phase 1** - Fourteen (14) slot-pairs shall be transferred as soon as practicable in time for use in the International Air Transport Association ("IATA") Northern Summer 2017 season;

   ii. **Phase 2** - Ten (10) slot-pairs shall be transferred in time for use in the IATA Northern Summer 2018 season and shall be subject to the exhaustion of efforts requirements in Section 2.h.

b. **JFK** – The Joint Applicants shall make available to eligible competitors four (4) slot-pairs for year-round use at JFK in two phases:

   i. **Phase 1** - Two (2) slot-pairs shall be transferred as soon as practicable in time for use in the IATA Northern Summer 2017 season;

   ii. **Phase 2** - Two (2) slot-pairs shall be transferred in time for use in the IATA Northern Summer 2018 season and shall be subject to the exhaustion of efforts requirements in Section 2.h.

2. Terms and Conditions

a. **Slot Transfer Agreements** – The Joint Applicants shall meet the terms and conditions of the slot divestiture, and arrange for the transfer of the slot-pairs, by entering into a Slot Transfer Agreement with each Selected Carrier. The Joint Applicants shall meet deadlines, and submit slot transfer agreements to DOT for prior approval, as follows:

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[78] A "slot-pair," consisting of two slots, enables one round-trip operation at slot-controlled airports. One slot is used for landing and the other for takeoff.

i. **Deadlines** – The Joint Applicants shall conclude slot transfer agreements with each Selected Carrier by deadlines established by DOT in notices or orders published in the docket. DOT may also establish deadlines in notices or orders by which Selected Carriers must demonstrate that they have exhausted efforts to obtain slots as provided under Section 2.h.

ii. **Prior Approval** – Prior to execution, each slot transfer agreement shall be submitted to DOT for prior approval.

b. **Transborder Service** – The slot-pairs shall be used exclusively to provide scheduled nonstop commercial air service originating from or terminating at MEX and originating from or terminating at JFK. MEX slot-pairs shall be used by Selected Carriers to provide nonstop service between MEX and U.S. airports, consistent with proposals made to DOT during the selection process. JFK slot-pairs shall be used by Selected Carriers to provide nonstop service between JFK and Mexican airports, consistent with proposals made to DOT during the selection process.

c. **Free and Permanent Transfer** – The slot-pairs shall be transferred to Selected Carriers permanently, irrevocably, and free of charge (without cash or non-cash consideration).

d. **Compliance with Usage Rules, Regulations, and Operational Requirements** – The Joint Applicants shall transfer slot-pairs that meet usage rules, regulations, and operational requirements imposed by slot administrators at MEX and JFK, respectively, such that the slot-pairs are not subject to withdrawal during or after the end of the scheduling season by virtue of any actions or omissions of the Joint Applicants. Selected Carriers shall comply with the same usage rules, regulations, and additional requirements on an ongoing basis for the duration of the terms and conditions as set forth in Section 5.

e. **Historical Priority** – The Joint Applicants shall transfer slot-pairs which, based upon local rules, are eligible for historical priority such that Selected Carriers may be expected to obtain such historical priority in the following corresponding seasons. For the duration of the terms and conditions of the slot divestiture, as set forth in Section 5, the Selected Carriers shall maintain historical priority for remedy slot-pairs.

i. **Ability to Improve Times** - Once the slot-pairs have been transferred by the Joint Applicants, no prior approval from DOT is necessary if Selected Carriers wish to work with the slot administrator or other operators at the airports to improve the timing of the slot-pairs to meet commercial needs.

f. **Preferred Times** –DOT may require eligible competitors to include preferred times in their requests for remedy slots. Subject to the hourly limits in Section 2.g., DOT may direct the Joint Applicants to transfer slots at or near the times requested by the eligible competitors. To facilitate the transfer process and fulfillment of the goals of the remedy, the Joint Applicants shall make reasonable efforts to identify and transfer slots that meet, as closely as possible, the timing requests of the Selected Carriers. DOT may require the Joint Applicants to meet the timing requests for each slot in a slot-pair within a sixty (60) minute window, subject to the hourly limits in Section 2.g. If the Joint Applicants do not have slots within the +/- sixty (60) minute window, DOT may require the Joint Applicants to offer to transfer the slots closest in time to the Selected Carriers' requests. The arrival and departure slot times shall allow for reasonable aircraft rotation taking into account standard industry practice for international flights, terminal requirements, and the Selected Carrier's business model, including aircraft utilization requirements.

g. **Hourly Limits** – For both Phase 1 and Phase 2 slots, the Joint Applicants shall use reasonable efforts to accommodate the timing requests of the Selected Carriers during hours declared as saturated or slot controlled by the airport authorities.
   i. **MEX** – At MEX, the Joint Applicants shall not be obligated to transfer more than six (6) slots per hour during hours that the airport authority has declared as saturated, provided, however, that the Joint Applicants may designate two (2) non-consecutive hours during the saturated period in which they will not be obligated to transfer more than four (4) slots per hour, in order to minimize disruptions to the Joint Applicants' banking of flights.
   ii. **JFK** – At JFK, the Joint Applicants shall not be obligated to transfer more than 2 slots per hour. During the 15:00-20:59 period, the Joint Applicants shall not be obligated to transfer more than 2 slots total.

h. **Exhaustion of Efforts to Obtain Slots** – The Phase 2 slot-pairs for both MEX and JFK are subject to the obligation of Selected Carriers to exhaust reasonable efforts to obtain slots from the slot administrators of the airports prior to making a request of the Joint Applicants. Selected Carriers shall apply to the slot administrators with specific timing requests. The requests shall, to the maximum extent possible, comply with local rules and shall be submitted on a timely basis, provided that the Selected Carriers receive notice of pertinent deadlines in advance. Selected Carriers shall be deemed to have exhausted all reasonable efforts, and the Joint Applicants shall be liable to divest the requisite amount of Phase 2 slots to satisfy the selections made by DOT, where: (1) the Selected Carrier submits evidence to DOT that it requested slot-pairs in writing on a timely basis and received no response or an incomplete response, or (2) the Selected Carrier submits evidence to DOT that it requested slot-pairs in writing on a timely basis and did not receive the slots it requested within a sixty (60) minute window (+/- 60 minutes from the request). Selected Carriers have until the deadlines provided in Section 2.a.i. to demonstrate that they exhausted all reasonable efforts. Pending the outcome of the exhaustion of efforts requirement, the Joint Applicants shall identify appropriate Phase 2 slots for potential timely transfer to Selected Carriers. DOT's written notice to the Joint Applicants that DOT has accepted a Selected Carrier's demonstration of exhaustion of efforts shall constitute a final decision that requires the Joint Applicants to transfer the requisite number of Phase 2 slots necessary to satisfy the selections made by DOT, subject to the terms and conditions of the slot divestiture.

i. **Access to Facilities and Services** – Selected Carriers intending to serve JFK and/or MEX using remedy slots shall use reasonable efforts to obtain access to facilities and services which are normally provided by the airport authorities at MEX and JFK and which are necessary to sustain the air service. Such facilities and services include, but are not limited to, gates, terminal space, ticket and boarding areas, and, if needed, permission and parking to Remain Over Night/ RON. Reasonable efforts require Selected Carriers, at a minimum, to work with the airport authorities to identify available space and accommodation and, if necessary, to avail themselves of forced accommodation provisions in applicable use and lease agreements at the relevant airport. If a Selected Carrier demonstrates to DOT that it has exhausted all reasonable efforts, but has not been able to obtain the access it requires at a minimum to introduce service with the remedy slots, the Joint Applicants shall be responsible for accommodating the Selected Carrier to the extent necessary to allow the services to operate in a commercially viable fashion. Nothing in this subsection shall be construed to require the Joint Applicants or any airport authority to provide access to facilities or services at rates below market levels or below charges established by accommodation provisions in existing airport use and lease agreements.

j. **Non-Interference** – The Joint Applicants shall not take any action that could in any way impede Selected Carriers from obtaining permits or authorizations, or interfere with eligible competitors' operations.

k. **Necessary Approvals and Authorizations** – Selected Carriers shall make reasonable efforts to obtain the necessary safety and economic authority from the Governments of the United States and Mexico to launch the new transborder services in a timely manner. Selected Carriers shall notify DOT if they face unreasonable delays.

l. **Duty to Provide Information to DOT** – The Joint Applicants shall respond promptly to information requests by the Department to facilitate the transfer of slot-pairs. Such requests may include, but shall not be limited to, the amount of slots held at MEX or JFK in total and/or by hour, any specific information corresponding to slots such as number or assigned times, and recorded usage of specific slots.

Appendix A

3. Eligibility and Selections

The Joint Applicants shall transfer slot-pairs consistent with the selections made by DOT by order(s) in the docket. DOT may select among competitors it deems eligible through notices or orders published in the docket, subject to the subsequent transfer and reassignment provisions in Section 4, below.

a. **Requests** – DOT may publish notices or orders in the docket to request proposals to obtain the slot-pairs made available by the slot divestiture. In such notices or orders, DOT may request that eligible competitors provide the key terms of their requests, including the requested timings, the number of frequencies, the routes intended to be served, proposed start date and schedule, and the aircraft intended to be operated, as well as a business and operational plan, including pricing structure, service offerings, and transborder network plan.

b. **Selections** – DOT may establish a ranking of the requests and propose the Selected Carriers, including primary and backup recipients.

4. Subsequent Transfers and Reassignment

Selected Carriers shall seek prior approval from DOT to transfer to third party airlines any slot-pairs obtained from the Joint Applicants as part of the slot divestiture. Any such subsequent transfers shall not include cash or non-cash consideration for the duration of the terms and conditions set forth in Section 5.

5. Duration

Although the Joint Applicants' transfer of slots to Selected Carriers is permanent, as required by Section 2.c., the terms and conditions of the slot divestiture apply to the Joint Applicants and Selected Carriers for a period of five (5) years from the date on which the Joint Applicants' antitrust immunity becomes effective. The terms and conditions apply for an initial five-year period from the date on which the Phase 1 slot-pair transfers are completed and the antitrust immunity becomes effective under the terms of a Final Order, and not beyond that initial period should the Joint Applicants re-apply for, and obtain, a further grant antitrust immunity.